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April 22, 2003

BY HAND DELIVERY

RECEIVED

Ms. Marlene Dortch, Secretary
Federal Communications Commission
The Portals Building
445 12th Street, SW
TW-A325
Washington, D.C. 20554

APR 22 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: INDUSTRIAL TELECOMMUNICATIONS ASSOCIATION
Informal Request for Certification to Coordinate the Power Radio
Service Under Part 90 of the Commission's Rules
RM No. 10687

Dear Ms. Dortch:

Progress Energy ("Progress"), by its attorneys, hereby requests that the attached letter previously submitted to the Commission be treated as formal comments in the above-captioned proceeding.¹ Subsequent to the filing of the attached letter the Commission by public notice instituted a rulemaking proceeding.² Accordingly, Progress wishes to officially incorporate it into the record.

Any questions with respect to this matter should be directed to the undersigned

Respectfully submitted,

Michael A. McCain

Jonathan L. Wiener

Michael A. McCain

Attorneys for Progress Energy

Attachment

cc: John Muleta (FCC)

¹ See letter to John Muleta, Chief, Wireless Telecommunications Bureau, from Jonathan L. Wiener, Counsel for Progress Energy, Re: ITA Request for Certification to Coordinate and Certify Services under Part 90, Mar. 26, 2003.

² See Report No. 2601, Mar. 26, 2003

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March 26, 2003

BY HAND DELIVERY

John Muleta, Chief, Wireless
Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Industrial Telecommunications Association Informal Request for
Certification to Coordinate and Certify Services under Part 90

Dear Mr. Muleta:

Progress Energy ("Progress"), by its attorneys, hereby responds to the above-captioned "informal" request of the Industrial Telecommunications Association ("ITA").¹ ITA requests certification authority to coordinate and certify the Power, Railroad, and Automobile Emergency Radio services. Progress opposes this informal request particularly because ITA failed to demonstrate that it represents the users in the bands at issue and the request is otherwise contrary to the public interest. Regardless, any change in the Commission's policy regarding specific frequency coordinators, would need to be addressed in the context of a rulemaking proceeding. Consequently, this informal request should be dismissed.

Progress and its affiliated companies, including Carolina Power and Light, Florida Power Corporation, and North Carolina Natural Gas, are utility companies engaged in the provision of electric and gas to the public. Unique to these and similarly situated companies is the necessary ability to manage emergency services for these

¹ IT-9 Informal Request for Certification to Coordinate the Power Radio Service, Railroad Service, and Automobile Emergency Radio service Under Part 90 of the Commission's Rules, to the Chief, Wireless Telecommunications Bureau, re Informal Request for Certification of the Industrial Telecommunications Association, Inc., January 27, 2003 ("ITA Informal Request").

critical infrastructure systems, including through communications during or following storms or other man-made or natural disasters that might disrupt delivery of such vital services. Similarly, the respective frequency band coordinators of the aforementioned power utility users, such as the United Telecom Council ("UTC"), need the ability to effectively administer and coordinate the respective communications frequency bands.²

The Commission has emphasized that safety of the public should not be compromised.⁷ More specifically, the Commission has stated that maintaining the integrity of spectrum used for public safety purposes (referring to, among other things, the utilities Power Radio Service) is extremely important and using coordinators who are knowledgeable of the special communication needs is the best way to protect these systems.⁴ For this reason, the Commission restricted coordination of these "quasi-public safety" frequency bands (within the Industrial/Business Pool) to coordinators who are representative of the relevant users and possess particular experience in managing these frequency bands.⁵

In the Refirming *2d RDO* the Commission consolidated the twenty (20) private land mobile radio ("PLMR") frequencies below 512 MHz into two exclusive broad service pools - one for Public Safety (including Special Emergency Radio Service) and one for Industrial/Business ("I/B").⁶ The Commission certified "current coordinators for the Public Safety Radio Services and the Special Emergency Radio Service as coordinators in the new Public Safety Pool."⁷ Likewise, the Commission determined that multiple coordinators would generally administer the new I/B frequency pool.* Thus, it certified all current coordinators in the non-Public Safety radio services below

² Generally, UTC is generally certified as a frequency advisory committee ("FAC") or frequency coordinator for the I/B Pool of PLMR frequencies below 512 MHz. UTC is specially authorized to coordinate the frequencies that were previously part of the Power Radio Service - frequencies below 512 MHz allocated for use by electric, gas, water, and steam utilities - of which it previously was certified as the frequency coordinator.

³ *In the Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Services*, Second Report and Order, 12 FCC Rcd 14307, 14329 (1997) (*"Refarming 2d RDO"*).

⁴ *Id.*

⁵ *Id.* at 14309.

⁶ *Id.*

⁷ *Id.* at 14325. This pool would also include the formerly named Local Government Radio Service. *Id.* at 11309.

⁸ *Id.* at 14310.

512 MHz, as coordinators of the new broad I/B frequency pool,⁹ with the exception of certain safety-related communications frequency bands.¹⁰

In making all I/ B Pool (non-Public Safety) frequency coordinators eligible to coordinate the entire broad I/B pool, the Commission reasoned that competition in the frequency coordination process would result in lower coordination costs and better service." Notwithstanding, the Commission limited to current certified frequency coordinators - those administering "critical public safety" related communications in PLMR frequency bands allocated for use by power, petroleum, and railroad companies - the coordination of certain frequency bands (within the new I/B pool) in order to ensure that the integrity of these "quasi-public safety" bands was not impaired.* The Commission specifically required anyone seeking use of these frequencies "to go through the same frequency coordinators that had been responsible for coordinating" them prior to the consolidation of the PLMR bands.¹³

As an initial matter, we oppose certification of ITA to coordinate the Power, Railroad, or Auto Emergency Radio Services because ITA has neither demonstrated that it represents the specific users in the "quasi-public safety" bands, nor does it have the particular expertise to coordinate such systems, particularly with respect to power utilities, which it does not represent. The underlying safety and emergency-response reasons for exclusive coordination continue to apply, especially given the even greater concerns for critical infrastructure communications security and integrity. It would be contrary to the public interest to allow coordination of these "quasi-public safety" bands by coordinators *not* especially experienced and truly representative of the particular users.¹⁴

ITA specifically asserts that it "*believes* it now meets the criteria for FAC-certification of the power, railroad, and automobile emergency radio service channels" due, in part to its large and diverse private land mobile industry membership.¹⁵ It does

⁹ *Id.* at 11322. The Industrial/Business Pool is comprised of frequencies that were previously allotted to any of the Industrial or Land Transportation Radio Services, including the Business Radio service.

¹⁰ *Id.* at 14328.

¹¹ *Id.* at 14327.

¹² *Id.* at 14309.

¹³ *Id.*

¹⁴ See *id.* at 14325.26.

¹⁵ ITA Informal Request at 6 (*emphasis added*). ITA claims that many of its "clients include power, railroad, and automobile emergency eligibles" but does not specifically name or describe them or even give the total number of "eligibles" it allegedly represents. ITA notes four criteria established by the Commission for FAC certification for the 800 and 900 MHz band. They include: (1) representative; (2) coordination

footnote cont'd on next page

not, however, identify any specific companies that fit into this category, much less electric power companies.¹⁶

ITA goes on to conclude that, in light of the Commission's previous reasoning - that "critical communications capabilities can be protected by the coordinator who is intimately familiar with the use of these frequencies"¹⁷ - it "*believes*" it is "intimately familiar" with the frequencies and applicants.* In spite of its professed "belief," ITA does not actually demonstrate that it is, indeed, representative and "intimately familiar" with the relevant frequency bands and users. On the contrary, ITA's reasoning is circular and does not credibly demonstrate that ITA represents the users of the relevant frequency bands.

ITA also touts the establishment of an overall coordination plan, general experience in coordinating, and nationwide capability.¹⁹ However, even assuming that this is all true, it simply cannot overcome the Commission's reasons for limiting coordination of the "quasi-public safety" frequencies to specific frequency coordinators within the I/B Pool.²⁰ Certainly, ITA possessed all of these qualities when the Commission adopted the exclusive coordinator policy in the *Refarming 2d R&O*. Moreover, the underlying reasons for exclusive coordination continue to apply. In particular, as the Commission has noted, in that there is little or no margin for error, "quasi-public safety" systems are best protected by maintaining the integrity of spectrum used through the exclusive use of frequency coordinators that are actually knowledgeable in the specific communication needs and truly representative of the users.²¹ This is even truer today given the heightened concerns regarding critical infrastructure Communications security and integrity.

plan; (3) experience; and (4) nationwide coordination capability. See *In the Matter of United Telecom Council; Informal Request for Certification as a Frequency Coordinator in the PLMR 800 MHz and 900 MHz Bands*, Order, 16 FCC Rcd 8436, 8441 (WTB 21101) ("*800/900 MHz Order*").

¹⁶ ITA Informal Request at b. The ITA Informal **Request** does include a **list** of trade associations for **which** it allegedly "**enjoys**" support. *Id.* at 2.

¹⁷ *Id.* at 7, citing *Refarming 2d R&O* at 11316.

¹⁸ *Id.* (emphasis added).

¹⁹ *Id.* at 7-10.

²⁰ See *Refarming 2d R&O* at 14329.30.

²¹ In that there is little or no margin for error, "quasi-public safety" systems are **best** protected by maintaining the integrity of spectrum used for **such** purposes thru coordinators who are knowledgeable in the specific communication needs. *Id.* at 74329.

Furthermore, the Commission's support of competition among frequency coordinators does not support certification of ITA.²² The Commission specifically considered competition in the *Refarming 2d R&O* and concluded generally that "Competition should be introduced into the coordinator services for each service group."²³ Nevertheless, in spite of probable competition public interest benefits, the Commission expressly limited coordination of the "quasi-public safety" frequencies within the I/B Pool to specific coordinators that possessed particular expertise and were truly representative of the class of users, such as electric power utilities. In essence, the Commission wisely determined that although competition among frequency coordinators is generally a good thing, the "quasi-public safety" requirements inherent in these frequency bands outweighed any potential competitive benefits.

Secondly, even if certifying ITA to coordinate these "quasi-public safety" frequencies within the I/B Pool was essential to the public interest, which it is not, such a proposal would need to be considered in the context of a notice and comment rulemaking proceeding. In this case, ITA is, in effect, proposing new rules and/or suggesting reconsideration of the *Refarming 2d R&O*. It cannot be overemphasized that in this rulemaking proceeding the Commission came to a reasoned policy conclusion, which limited coordination of certain "quasi-public safety" frequencies in the I/B pool to specific coordinators that were indeed representative of the particular users and experienced in the respective frequency bands. ITA was expressly excluded as a coordinator of these "quasi-public safety" I/B bands while certain frequency coordinators were expressly included. ITA is now proposing to change this rule of policy established in the *Refarming 2d R&O*, even though this critical compromise was fundamental to the proceeding. Consequently, the specific exclusion cannot be altered absent full consideration in the context of a notice and comment rulemaking proceeding.

As a final matter, we note that this case is unlike the *800/900 MHz Order* where, outside of a rulemaking proceeding, the Commission concluded that all coordinators authorized in the 512 MHz band were qualified to coordinate the 800 MHz and 900 MHz Business and Industrial/Land Transportation ("I/LT") frequencies.²⁴ In that Order, the Commission considered similarly situated certified frequency coordinators that were *already representative* of the particular class of users of the frequencies it was

²² ITA Informal Request at 10, citing *In the Matter of the Biennial Review - 47 C.F.R. part 90 - Private Mobile Radio Services*, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9830, 9857 (2002).

²³ *Refarming 2d R&O* at 14308.

²⁴ *800/900 MHz Order* at 8445.

John Muleta, Chief, Wireless Telecommunications Bureau
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sceking certification to coordinate.²⁵ In this case, ITA has not demonstrated that it is truly experienced and represents the particular “quasi-public safety” class at issue, let alone any, much less any significant mass of, electric power utilities.²⁶

Accordingly, for the aforementioned reasons, the Commission should dismiss the ITA Informal Request.

Respectfully submitted,

/s/ Jonathan Wiener

Jonathan L. Wiener
Michael A. McCain
Attorneys for Progress Energy

cc: Jeremy Denton, Director, Government Affairs, ITA
Robin Landis, Regulatory Affairs Assistant, ITA

²⁵ *Id.* at 8441-8442

²⁶ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by first-class mail, postage prepaid, this 22nd day of April, 2003. to the following:

Jeremy Denton, Director Government Affairs
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